Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

No. 80-363

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JULIANN LEWIS,

Petitioner,

vs.

JOHN M. LEWIS AND
THE NATIONWIDE MUTUAL INSURANCE
COMPANY,

Respondents.

BRIEF IN OPPOSITION TO GRANTING PETITIONER'S WRIT OF CERTIORARI

WILBUR W. JONES
2500, One Nationwide Plaza
Columbus, Ohio 43215
(614) 228-5511

and

WILLIAM H. JONES
Counsel of Record
2500, One Nationwide Plaza
Columbus, Ohio 43215
(614) 228-5511

Attorneys for Respondent
The Nationwide Insurance
Company

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	II
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENTS IN OPPOSITION TO GRANTING THE WRIT	2
ARGUMENT IN OPPOSITION TO GRANTING THE WRIT	2
CONCLUSION	8

TABLE OF AUTHORITIES

Cases:	Page
Chicago and E.I.R. Co. v. *Industrial Commission of Illinois* (1932) 284 U.S. 296, 76 L Ed 304, 52 S Ct 151	3
Ferguson v. *Shrupa,* 372 US 726, 732, 10 L Ed 2d 93, 83 S Ct 1028 (1963)	7
Fox Film Corp. v. *A. B. Mueller* (1935) 296 US 207, 56 S Ct 183, 80 L Ed 158	5
Herb v. *Pitcairn* (1954) 324 US 117, 125, 65 Sup Ct 459, 89 L Ed 789	5
Lyons v. *Lyons,* 2 Ohio St 2d 243, 208 NE 2d 533 (1965)	3, 4
Michigan-Wisconsin Pipe Line Co. v. *Covert,* (1954) 347 US 157, 98 L Ed, 583, 74 S Ct 396 reh den 347 US 931, 98 L Ed 1083, 74 S Ct 528	2
New York Times v. *Jasealvich,* (1978) 439 US 1317, 995 S Ct 6, 58 L Ed 2d 25	5
Thomas v. *Herron* (1969), 20 O St 2d 62	3
Trammel v. *United States,* 63 L Ed 2d 126 (1980)	2, 6
Varholla v. *Varholla,* 56 Ohio St 2d 269, 388 NE 2d 88 (1978)	4

No. 80-363

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

JULIANN LEWIS,

Petitioner,

vs.

JOHN M. LEWIS AND
THE NATIONWIDE MUTUAL INSURANCE
COMPANY,

Respondents.

BRIEF IN OPPOSITION TO GRANTING PETITIONER'S WRIT OF CERTIORARI

STATEMENT OF THE CASE

The present case arises out of a February 21, 1978 automobile accident in which the petitioner, Juliann Lewis, was a passenger in a motor vehicle driven by respondent, John Lewis. Co-respondent, Nationwide Insurance Company, insured the car which at the time of the accident was owned by Juliann Lewis. On March 17, 1978, the above mentioned parties were married and three days later Mrs. Lewis filed a negligence action against Mr. Lewis and Nationwide Insurance.

A Motion for Summary Judgment was filed by defendants at the trial level and was sustained by the judge who based his decision on the Doctrine of Interspousal Im-

munity. (See Pet. Appendix D and F.) The Franklin County Court of Appeals affirmed the decision (Pet. App. C1-C11) and the Supreme Court of Ohio dismissed the appeal.

SUMMARY OF ARGUMENTS IN OPPOSITION TO GRANTING THE WRIT

The decision from which this Writ of Certiorari is requested is that of the intermediate Court of Appeals. Supreme Court review would then be precluded in that the decision relies upon adequate and independent state grounds in following the Doctrine of Interspousal Immunity and did not deal with a substantial federal question.

While the Court has recently decided the case of *Trammel* v. *United States,* 63 L Ed 2d 126 (1980), any alleged similarity is quite superficial and is distinguishable on the facts.

The issue of the abrogation of interspousal immunity should properly remain in the hands of the legislature.

ARGUMENTS IN OPPOSITION TO GRANTING THE WRIT

In *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* (1954) 347 US 157, 98 L Ed 583, 74 S Ct 396 reh den 347 US 931, 98 L Ed 1083, 74 S Ct 528, this court stated:

> Appeal is properly taken from decision of state intermediate appellate court and not from that of highest court of state where highest court of state refused appellant's application for writ of error, even though under state law such refusal signifies that highest state court deems judgment of intermediate appellate court correct one and principles of law declared in opinion correctly determined.

Also in *Chicago and E.I.R. Co.* v. *Industrial Commission of Illinois,* (1932) 284 U.S. 296, 76 L Ed 304, 52 S Ct 151, it was held:

> 1. Where the highest court of a state, in the exercise of its discretion, has declined to review a judgment of a lower court, a writ of certiorari from the Supreme Court of the United States to review the state judgment is properly addressed to the lower court.

In the case at bar, given the refusal of the Ohio Supreme Court to hear the case, the writ of certiorari requested is to review the decision of the Franklin County Court of Appeals (see Pet. App. C1-C11). In that decision the court did not deal with the constitutional issue that petitioner raised, stating that as an intermediate Court of Appeal it was beyond their providence to hold a controlling decision of the Ohio Supreme Court unconstitutional.

In affirming the lower court's ruling it discussed extensively the controlling Ohio case law in support of the Doctrine of Interspousal Immunity.

The first was the on point Ohio Supreme Court case of *Thomas* v. *Herron* (1969), 20 Ohio St. 2d 62, 253 N.E. 2d 772, which held:

> A suit based on negligence may not be maintained between spouses living together, for injuries sustained prior to the marriage.

Thomas cited a similar Supreme Court case, *Lyons* v. *Lyons,* 2 Ohio St 2d 243, 208 NE 2d 533 (1965) and went on to state:

> *Lyons* (2 Ohio St. 2d 243, 244) also recognized that in the case where the defendant in fact is the defen-

> dant-spouse's liability insurer, there is a possibility that the spouses will be induced to 'raid' the insurance carrier for a windfall recovery. Even in the case of a substantial injury, the probability exists that the element of liability, as well as pain and suffering, would be susceptible of exaggeration because of the intimate relationship of the parties. The fact that the injury occurred before the parties were married does not extinguish this risk.

In *Lyons, supra,* it is stated at 245 of the opinion:

> There is the real danger of fraud or collusion between the spouses in such suits against each other, where insurance is involved. Such suits encourage raids upon insurance companies. * * *
>
> * * *
>
> In truly adversary cases, fraud is likely to be uncovered because of the desire of the defendant to avoid the loss. Where insurance is involved, the risk of loss is removed, and both spouses stand to gain from a decision adverse to the defendant. This creates a strong inducement to trump up claims and conceal possible defenses. * * *

In *Varholla* v. *Varholla,* 56 Ohio St 2d 269, 388 NE 2d 88 (1978) the Ohio Supreme Court most recently reaffirmed its support of the doctrine when it stated:

> Suffice it to say that we adhere to the principles expressed in *Lyons,* in the belief that they are as sound today in social policy as they are in reason. *Appellant's contention cannot be accepted in disregard of clear precedent.* (Emphasis Added)

The decision then rests upon an application of clear precedent supporting interspousal immunity in Ohio. While there may exist a constitutional question, involved the basis here was an adequate and independent state ground.

In *Herb* v. *Pitcairn* (1954) 324 US 117, 125, 65 Sup Ct 459, 89 L Ed 789, Justice Jackson stated:

> This court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds.

In *Fox Film Corp.* v. *A. B. Mueller* (1935) 296 US 207, 56 S. Ct. 183, 80 L Ed 158, it was held:

> . . . the case is controlled by the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.

Also Justice White in *New York Times* v. *Jasealevich*, (1978) 439 US 1317, 995 S Ct 6, 58 L Ed 2d 25, stated:

> Whether a state-court judgment is subject to review by the Supreme Court on writ of certiorari is in turn governed by 28 USC § 1257 [28 USCS § 1257], which provides that we have jurisdiction to review '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . .' Also, it is only final judgments with respect to issues of federal law that provide the basis for our appellate jurisdiction with respect to state-court cases.

The respondent is well aware that favorable state law is not dispositive when one is seeking higher court review, however it is submitted that the state cases on point not only follow an unbroken line of authority but are based upon sound and reasonable policy decisions. Whether or not the federal question is of such a substantial nature or of sufficient importance as to deserve review is not the issue since the independent and adequate state basis precludes the granting of the writ.

The petitioner has also cited *Trammell* v. *U.S.*, 63 L Ed 2d 126 (1980) as indicative of the court's thinking with respect to matters between husbands and wives.

In *Trammell,* it was held that:

> 1a-1c. The privilege against adverse spousal testimony vests in the witness spouse alone, and that witness may be neither compelled to testify nor foreclosed from testifying; that the testimony by a spouse in a criminal prosecution comes after a grant of immunity and assurances of lenient treatment does not render the spouse's testimony involuntary.

Justice Burger drives home the logic of this position when he states:

> The contemporary justification for affording an accused such a privilege is also unpersuasive. When one spouse is willing to testify against the other in a criminal proceeding -- whatever the motivation their relationship is almost certainly in disrepair; *there is probably little in the way of marital harmony for the privilege to preserve.* [Emphasis Added.] In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace.

This reasoning however is clearly not applicable to the present case. While it is true that in *Trammel, supra,* and the present case, marital harmony was and probably will not be adversely affected, the reasons are totally different. In the former case it was clear that the testimony of the wife was directly against her husband and led to negative results; his imprisonment, and her willingness to testify were indicative of their relationship (i.e., a lack of any marital harmony to be preserved).

In the case at bar, however, the testimony of Mrs. Lewis is not directed against her husband but in reality against Nationwide Insurance Company and could well lead to a very positive result, a judgment in her favor. Obviously the marital harmony (which still appears to exist) of Mr. and Mrs. Lewis would not be affected as any judgment would accrue to both their benefit. It follows just as obviously that Mr. Lewis has no motivation to be his wife's adversary. In the instant case it is this lack of an adversary proceeding and the very real possibility of fraud and collusion and not the "preservation of marital harmony as in *Trammel, supra,* that led the courts in this case to base their decision on the Doctrine of Interspousal Immunity as it is recognized in Ohio.

It should also be of interest to the Court, as mentioned by petitioner, that the Ohio Legislature is presently considering a bill which abrogates the doctrine of interspousal immunity.

In *Ferguson* v. *Shrupa,* 372 US 726, 732, 10 L Ed 2d 93, 83 S. Ct. 1028 (1963) this Court stated it is only "invidious discrimination" which offends the constitution and stated:

> The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases — that due process authorizes courts to hold laws constitutional when they believe the legislature has acted unwisely — has long

since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.

CONCLUSION

For the foregoing reasons the respondent would oppose any granting of the petitioner's writ of certiorari and asks that such writ be denied.

Respectfully submitted,

WILBUR W. JONES
2500, One Nationwide Plaza
Columbus, Ohio 43215
(614) 228-5511

and

WILLIAM H. JONES
2500, One Nationwide Plaza
Columbus, Ohio 43215
(614) 228-5511

Attorneys for Respondent
The Nationwide Insurance
Company